

March 10, 2021

Assisted Living Legal Study Group

RE: Assisted Living Licensure Requested Clarifications

Dear Assisted Living Study Group Members:

Please accept this correspondence as the Minnesota Department of Health's (MDH's) response to the Assisted Living (AL) Legal Study Group's correspondence dated February 17, 2021. MDH appreciates your questions and willingness to work with MDH in ensuring the smooth implementation of assisted living facility licensure in Minnesota. As discussed below, MDH's responses are limited to the application of Chapter 144G. MDH declines at this time to base its answers to the AL Study Group's questions on its proposed rules since MDH is still awaiting Administrative Law Judge Ann O'Reilly's Report.

MDH agrees that a vendor providing contracted assisted living services in a licensed assisted living facility is not required to hold a comprehensive home care license.

MDH also agrees that a management company that is **not** the owner, lessee, or other operator of the assisted living building can hold an assisted living license as long as the management company remains "responsible for the management, control or operation of the facility" under Minn. Stat. §§ 144G.08, Subd. 32 and 144G.10, Subd. 1. Moreover, as part of the application for licensure, an applicant must include "the business name and legal entity name of the licensee, and the street address and mailing address of the facility" under Minn. Stat. § 144G.12 Subd. 1(1). Additionally, Minn. Stat. § 144G.12 Subd.1(2), requires applicants to provide "the name, e-mail addresses, telephone numbers, and mailing addresses of all owners, controlling individuals, managerial officials, and the assisted living director." Moreover, MDH believes that it is outside its purview to give advice as to how a business, corporation, or real estate investment trust is setup. Rather, MDH's role is to ensure that the licensee remains "legally responsible for the management, control, and operation of the facility" in regulating assisted living facilities under Chapter 144G.

MDH further agrees that not every party involved in the control, operation, or marketing of an assisted living facility must be licensed. Under Minn. Stat. § 144G.10, Subd. 1, only the assisted living facility must be licensed, "regardless of a management agreement or subcontract." Moreover, MDH agrees that once a license for an assisted living facility is issued, the licensee

remains responsible for the management, control, or operation of the facility even if it delegates the regulated activities outlined in Chapter 144G to different entities.

As to question 4, the legislature amended chapter 144G via the seventh special session by, among other things adding section 144G.191. Section 144G.191, subdivision 4, provides that “[h]ousing with services establishments registered under chapter 144D, providing home care services according to chapter 144A to at least one resident, and intending to provide assisted living services on or after August 1, 2021,” may convert to assisted living licensure. These are the only entities identified in statute as being able to apply to convert to assisted living licensees. If a comprehensive home care provider joins with a housing with services establishment to form one entity that meets this description, the resulting entity could convert to assisted living facility licensure. Unfortunately, due to a drafting error, this section now requires such applicants to follow the provisional license requirements of section 144G.16. See § 144G.191, subd. 4 (“The commissioner shall consider the application [of a converting housing with services establishment] in accordance with section 144G.16.”). Accordingly, until this section is amended to correct the drafting error, even converting applicants will be subjected to the provisional license requirement. This is why MDH committed on the record of the still pending rulemaking to withdraw proposed Rule Part 4659.0060, which excepts converting applicants from the provisional license requirement, if the statutory error is not fixed before the new assisted living licensure rules are adopted. See MDH’s Hearing Exhibit L at pp. 1–2.

The AL Study Group seeks clarification around service plans and assessments for assisted living facilities with transitioning residents. To the extent an assisted living facility, whether it is converting or otherwise, has previously completed assessments and service plans for its transitioning residents, it would need to keep these items current and in compliance with chapter 144G, but it would not need to repeat these steps automatically as a result of becoming licensed as an assisted living facility.

MDH further agrees that if an entity converts to a licensed assisted living facility as of August 1, 2021, its employees will not be required to undergo new employee background studies, tuberculosis screenings, and basic training requirements as a result of conversion. Assisted living facilities will need to satisfy and maintain compliance with the training requirements of chapter 144G, however, regardless of conversion. Moreover, MDH believes that it is outside of its purview to give guidance as to how a licensed assisted facility structures its business involving the use of W-2 employees. MDH asserts that the licensee as listed on the licensure application remains “legally responsible for the management, control, and operation of the facility” under Chapter 144G.

Additionally, a question was raised as to how MDH will determine whether an applicant for licensure has provided evidence establishing its workers' compensation coverage, if the insurance certificate identifies the name of the insured as being different from that of the licensee. The license applicant bears the burden of establishing sufficient information to show that the applicant meets the requirements for licensure under Minn. Stat. § 144G.12, subd. 1. Thus, the license applicant must provide MDH with sufficient information showing that the license applicant has workers' compensation coverage like a letter from a workers' compensation insurance company stating that the license applicant has coverage that meets the requirements outlined in Minn. Stat. §§ 176.181 and 176.182.

MDH will review applications in the order that MDH receives them to ensure that all applicants are treated fairly. As a result, MDH encourages license applicants to apply as soon as MDH makes the licensure application available.

MDH declines to answer the AL Legal Study Group's questions over whether the assisted living licensee must be the W-2 staff employer and whether an assisted living director must be a W-2 employee of the assisted living licensee. MDH will not give advice as to how to structure an assisted living business or how to manage its workforce. As discussed above, once an assisted living facility is licensed, as the licensee, the facility remains responsible for the management, control, or operation of the facility.

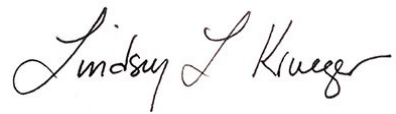
MDH agrees that under Minn. Stat. § 144G.50, subd. 5, assisted living facilities are prohibited from including "a waiver of facility liability for the health and safety or personal property of a resident." In addition, MDH agrees that the contract must not include any provision that a facility knows or should know to be deceptive, unlawful, or unenforceable under state or federal law." Thus, in enacting Minn. Stat. § 144G.50, subd. 5, the Minnesota Legislature outlined the liabilities waivers that assisted living facilities are prohibited from including in their contracts. Assisted living facilities are not prohibited from including liability waivers that do not conflict with the requirements outlined in Minn. Stat. § 144G.50, subd. 5.

You asked two questions regarding marketing as an assisted living facility involving proposed Minn. R. 4659.0040, subp. 1. As discussed above, MDH declines to base its answers to the AL Study Group's questions on its proposed rules since MDH is still awaiting Administrative Law Judge Ann O'Reilly's Report.

MDH declines to answer the questions posed about the Department of Human Services' (DHS') provider enrollment since MDH and DHS are separate state agencies. MDH encourages you to reach out to DHS for answers to your questions regarding their control over Minnesota Health Care Programs (MHCP).

MDH hopes that this correspondence clarifies the licensing issues you raised in your February 17, 2021 correspondence. MDH looks forward to continuing to work with you on the implementation of assisted living licensure in Minnesota.

Sincerely,

A handwritten signature in cursive script that reads "Lindsey L. Krueger".

Lindsey Krueger, RN

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